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No. 80-1766

IN THE

Supreme Court of the United States

October Term, 1980

COLUMBUS AND SOUTHERN OHIO ELECTRIC COMPANY,

Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF OF APPELLANT, COLUMBUS AND SOUTHERN OHIO ELECTRIC COMPANY, IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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Appellant, Columbus and Southern Ohio Electric Company (hereinafter "the Company"), submits that the arguments advanced by Appellee in its Motion to Dismiss or Affirm are unsupported by the law or by the record below. The Court should overrule Appellee's motion and note probable jurisdiction in this case.

I.

Appellee, The Public Utilities Commission of Ohio (hereinafter "the Commission"), is plainly incorrect in asserting in its motion that an appeal does not lie under 28 U.S.C. § 1257(2) from the judgment of the Ohio Supreme Court in this case. The reference to a "statute of any state" in Section 1257(2) encompasses not only the laws passed by a state legislature, but also the orders of state commissions issued in the exercise of delegated legislative authority. Orders of state public utilities commissions are therefore within this definition of "statute." *See, e.g., Atchison, Topeka & S. F. R. Co. v. Pub. Util. Comm.*, 346 U.S. 346, 348-49 (1953); *Lake Erie & Western R. Co. v. State Pub. Util. Comm.*, 249 U.S. 422 (1919). This principle was recently recognized in *Consolidated Edison Co. v. Pub. Serv. Comm.*, 444 U.S. 822 (1979), where the Court noted probable jurisdiction over an *appeal* from a judgment of the New York Court of Appeals affirming an order of the New York Public Service Commission, and ultimately reversed the judgment. 447 U.S. 537 (1980). The Commission's claim that this Court lacks jurisdiction over this appeal must therefore be rejected.

II.

The Commission has made a number of factual assertions in its Statement of the Case which are apparently intended to convince the Court that the refusal to allow compensation for the costs of purchased power did not amount to an unconstitutional taking, or, in the alternative, that the Company had, in some unexplained way, already been compensated for the costs of these mandated purchases. All of these assertions share a common flaw, in that they are *post hoc* rationalizations of counsel, none of which were relied upon as a basis of the decision below, and none of which have any foundation in the record.

The first such assertion is that the Company received "an unquantified benefit" because the Commission's order was intended "to preserve the reliability of the interconnected network of facilities among electric utilities." Motion, p. 4. This purported benefit exists only in the imagination of the Commission's counsel. Although electric utility systems in Ohio are interconnected, each utility's system normally operates as a separate, self-sufficient unit, without interchanges of power with other utilities. That one utility may be unable to serve demands on its own system does not therefore affect the ability of surrounding utilities to serve their customers, and would certainly not lead to a "regional blackout" as claimed by the Commission.[1] Even if a regional blackout was indeed a possibility, which in fact it was not, the Commission fails to explain how the prevention of service interruptions conferred a benefit on the Company and its shareholders, as opposed to its customers and those of interconnected utilities. The fact remains that the net effect of the Commission's action was to impose an uncompensated $6 million expense on the Company and its shareholders, while customers benefited from undiminished service.

The next rationalization offered by the Commission is that there is a "possibility" that the Company incurred a benefit as a result of the Commission's orders because it was able to make sales of electricity which would not have been possible if the Commission had imposed mandatory curtailments. Motion, p. 5. The Commission ignores the fact

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[1] In the majority of situations, there is a combination of automatic and manual actions which can be taken by a utility to prevent a blackout from extending to the utility's entire system. U.S. Dept. of Energy, *The National Electric Reliability Study: Final Report*, 39-40 (April 1981) (DOE/EP-0004). The same types of actions (transmission line relaying, load shedding) are relied upon to prevent the blackout from extending to adjoining utility systems.

that the revenues from those sales were insufficient to recover the extraordinary costs incurred as a result of the Commission's orders. The ability to make sales is no "benefit" if those sales are made below their actual costs. Accordingly, the Company would have been better off had the Commission imposed mandatory curtailments, because the Company would not have been required to purchase power and to resell that power to customers at rates below cost.

The next *post hoc* rationalization offered by the Commission is its assertion that the Company was compensated for this $6 million expense in either its permanent rate case (Case No. 78-1438-EL-AIR), or in a related emergency rate case (Case No. 78-1439-EL-AEM). These assertions are plainly untrue. The Commission's order in the permanent rate case specifically rejected the Company's request for compensation for the mandated power purchases, App. A55, and it is incredible that it should now argue that it in fact granted this request in some mysterious way. With respect to the emergency rate order, the Commission neglects to inform the Court that the Company made no request for compensation in that case, and that the emergency relief was granted to avert a financial crisis which occurred nearly a year after the power purchases in question. Indeed, the Commission offers no explanation of how these orders purportedly provided compensation to the Company, conceding that "no analysis has ever been done to measure the net benefit or detriment" to the Company. Motion, p. 6. In any event, however, it is a little too late in the game for the Commission to contend that the amount of the purchased power expense that remains uncompensated is somehow less than the $6 million claimed by the Company, since the Ohio Supreme Court specifically found that compensation was denied, and that the amount of the unrecovered expense "is not

at issue in this proceeding," 64 Ohio St. 2d at 175-176, 413 N.E.2d at 1209, App. A3-A4.

Finally, the Commission offers the incredible suggestion that because of the "merger" of the Company with American Electric Power Company (AEP) two years after the purchases of power in question, the constitutional requirement of just and full compensation should be ignored because some of the compelled purchases of power may have come from subsidiaries of AEP. Motion, p. 7. This assertion is not only factually incorrect, it is premised upon fallacious logic. The factual error is that C&SOE was not "merge[d] into the American Electric Power Company" as claimed by the Commission. Rather, AEP acquired a majority of the common stock of the Company, and the Company maintained a corporate identity, as a wholly-owned subsidiary, separate and distinct from that of AEP or any other AEP subsidiary. The logical error is the assumption that this acquisition has any impact upon the Company's right to compensation. The fact that some of the purchased power costs incurred by the Company were paid to other utilities which happened to be AEP subsidiaries does not alter the fact that these costs were actually incurred and paid by the Company, and were never recovered.

III.

The Argument portion of the Commission's Motion continues and expands upon the fallacious reasoning advanced in its Statement of the Case, arguing that this case is not "ripe" [sic] for review because the Company has allegedly already recovered the $6 million at issue in this case.[2] As has already been stated, the claim that the Com-

[2] Apparently, the Commission has confused the doctrine of "ripeness" for the doctrine of "mootness."

pany has somehow received compensation for this taking simply contradicts the record and findings below, and is merely an invention of counsel.

The Commission next attempts to convince the Court that this case does not present an important issue which merits review because it involves only a "situation peculiar to Ohio at a particular point in time." Motion, p. 8. The Commission's claim that the impact of the Ohio Supreme Court's judgment can be so confined is belied by the concerns of the *amici curiae* who have filed briefs in this case, as well as by the threat of another electrical supply emergency as a result of the current UMWA strike.[3]

When the Commission finally gets around to a legal argument to rebut the Company's claim of an unconstitutional taking, the only precedent which it is able to muster concerns the constitutionality of land use regulation and of the compelled construction of railroad grade crossings. These cases are legally and factually inapposite to this

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[3] Because of the protracted nature of the current strike, Ohio utility coal supplies have been depleted to the point that on May 27, 1981, the Commission required the initiation of emergency electrical procedures prescribed in its regulations and in the tariffs of Ohio's electric utilities. The Commission's order is reproduced as an appendix to this brief.

If coal supplies continue to be depleted, Ohio electric utilities face the prospect of Commission orders requiring purchases of power to preserve coal supplies. While the Federal Energy Regulatory Commission (FERC) has placed some limitations on the amount of percentage "adders" that can be charged by a utility which transmits or "wheels" purchased power, *see* 45 Fed. Reg. 31294 (May 13, 1980), it has not placed limitations on percentage "adders" imposed by the utility which actually generates the power. Even with these minimal limitations, if Ohio utilities are required to purchase power to meet this new emergency, they will incur substantial non-fuel related charges for which they will be unable to recover compensation under the decisions below.

case, and are therefore unpersuasive. Zoning regulations such as those involved in *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (prohibiting operation of a brick manufacturing plant in a residential area), and in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (prohibiting industrial uses in residential areas), do not destroy an owner's right to use his property; they simply impose limitations on noxious or incompatible uses of property. The Commission's action in this case imposed no such limitation, but was an outright confiscation of the Company's property. The railroad grade crossing cases cited by the Commission are likewise inapposite, since this Court found that the requirement to construct grade crossings was not an unconstitutional taking because the initial license granted to the railroad to use public rights-of-way carried with it the obligation to do so in a manner which would preserve the public safety and convenience. *See, e.g., Atchison, Topeka & S. F. Ry. Co. v. Pub. Util. Comm.*, 346 U.S. 346, 353 (1953) There was no analogous undertaking by the Company in this case.

The Commission's concluding argument involves a misleading attempt to distinguish *City of Pittsburgh v. Pennsylvania Pub. Util. Comm.*, 42 Pa. Commw. Ct. 242, 40 A.2d 672 (1979). Contrary to the Commission's assertion, the Pennsylvania Commission's decision on review in that case did in fact grant relief in an amount calculated to reimburse the utility for the actual costs of power purchased during the coal strike under order of the Pennsylvania Commission. *See also, Pennsylvania Pub. Util. Comm. v. West Penn Power Co.*, 33 PUR 4th 543 (Pa. P.S.C. 1980). As has already been noted, the emergency rate relief which the Ohio Commission granted to the Company, Motion, p. 12, was not intended to, and did not in fact, compensate the Company for the mandatory purchases of emergency power during the coal strike.

CONCLUSION

The Motion to Dismiss or Affirm should be overruled, and probable jurisdiction should be noted in this case.

Respectfully submitted,

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APPENDIX

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Implementation of the Emergency Procedures of electric utilities subject to Commission jurisdiction to be followed in the event of a shortage in the supply of electrical energy.	Case No. 81-619-EL-COI (May 27, 1981)

ENTRY

The Commission, coming now to consider the above-entitled matter, finds:

(1) That each electric utility has emergency procedures to be followed in the event of an electrical energy shortage.

(2) That each of these plans contemplate husbanding declining fuel supplies at individual plants when necessary to protect the integrity of the power system then and in the future in the face of continuing decline of fuel availability.

(3) That procedures which preserve remaining coal supplies are reasonable and necessary when appropriate to protect the public health and safety by protecting the continued integrity of the interconnected electric system.

(4) That these actions would conflict with the requirements of Rule 4901:1-11-02 (B) of the Ohio Administrative Code (OAC) which requires the operation of the respective systems on an economic dispatch basis. Economic dispatch fails to assure fuel conservation at individual plants.

(5) That the Commission should suspend Rule 4901:1-11-02 (B), OAC for the limited period during which individual plants have less than 40 days supply remaining. The suspension should apply

only on a plant by plant basis and only in those circumstances where deviation from economic dispatch protects available fuel supply.

(6) That each electric utility shall file a report with the Commission of any deviations from economic dispatch pursuant to finding (5) above both at the initiation of such deviation and as a part of its monthly fuel reports. The reports shall specify the nature and justification for each departure from economic dispatch.

It is, therefore,

ORDERED, That rule 4901:1-11-02 (B), OAC is suspended to the limited extent described above. It is further,

ORDERED, That the reports described in finding (6) be filed. It is, further,

ORDERED, That copies of this entry be served on each party of record. It is, further,

ORDERED, That nothing herein contained shall be deemed to be binding upon this Commission in any subsequent investigation or proceeding involving the justness or reasonableness of any rate, charge, rule or regulation.

THE PUBLIC UTILITIES
COMMISSION OF OHIO

/s/ WILLIAM S. NEWCOMB
Chairman

/s/ DENNIS S. PINES

/s/ MICHAEL DEL BANE
Commissioners